

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Petition of UTEX Communications)
Corporation, Pursuant to Section)
252(e)(5) of the Communications)
Act, for Preemption of the Jurisdiction)
of the Public Utility Commission of)
Texas Regarding Interconnection)
Disputes with AT&T Texas)
WC Docket No. 09-134

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 2009

Released: October 9, 2009

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we address the petition of UTEX Communications Corporation (UTEX)1 for preemption of the jurisdiction of the Public Utilities Commission of Texas (PUCT) pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (Act).2 In its petition, UTEX asks the Commission to preempt the jurisdiction of the PUCT and arbitrate pending interconnection disputes in the negotiation of a new interconnection agreement between Southwestern Bell Telephone Company d/b/a SBC Texas (now AT&T Texas) and UTEX involving the regulatory treatment of Voice over Internet Protocol (VoIP) traffic. UTEX’s petition for preemption alleges that the PUCT failed to carry out its responsibilities under section 252 by refusing to “move forward and fully and finally arbitrate the UTEX-AT&T interconnection disputes pursuant to federal law.”3 For the reasons set forth below, we deny UTEX’s petition for preemption.

II. BACKGROUND

2. Under the Act, an incumbent local exchange carrier (ILEC) must allow other telecommunications carriers to interconnect with its network “for the transmission and routing of telephone exchange service and exchange access . . . on rates, terms, and conditions that are just,

1 See Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134 (filed July 13, 2009) (UTEX Petition).

2 See 47 U.S.C. § 252(e)(5); 47 C.F.R. § 51.801 (providing that the Commission shall preempt if a state commission fails to act to carry out its responsibilities under section 252 in any proceeding or other matter).

3 UTEX Petition at 1.

reasonable, and nondiscriminatory,”⁴ and “shall make available any interconnection, service, or network element provided under an agreement approved under this section [252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”⁵ If negotiations between the parties fail or reach an impasse, any party to the negotiation may, between the 135th and 160th day (inclusive) “after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, . . . petition a State commission to arbitrate any open issues.”⁶

3. When arbitrating a dispute over a new interconnection agreement, the state commission must resolve “each issue set forth in the petition and the response” and “shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection].”⁷ If a state commission “fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction of that proceeding or matter”⁸ If a party petitions the Commission to preempt the jurisdiction of the state commission, it is that party’s burden to “prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.”⁹

4. The UTEX Petition arises out of an interconnection dispute between UTEX and AT&T Texas that began in 2002 when UTEX filed a petition asking the PUCT to arbitrate the terms of a new interconnection agreement between it and AT&T Texas.¹⁰ Over the next several years, the parties agreed to extend the arbitration schedule such that a list identifying the issues to be addressed by the PUCT was not submitted to the PUCT until November 2005.¹¹ The issues for arbitration are contained in a 1500-plus page document filed with the PUCT, but can be broken down into three main categories: ISDN interconnection options and requirements for new technology; liquidated damages/performance standards; and dispute resolution. In February 2006, the PUCT’s arbitrators requested that the parties identify any issues on this list that implicated or involved VoIP.¹² UTEX represented that all parts of the interconnection agreement were related to VoIP because the company’s principal business plan was to

⁴ 47 U.S.C. § 251(c)(2).

⁵ 47 U.S.C. § 252(i).

⁶ 47 U.S.C. § 252(b)(1).

⁷ 47 U.S.C. § 252(b)(4)(C).

⁸ 47 U.S.C. § 252(e)(5).

⁹ 47 C.F.R. § 51.803(b).

¹⁰ See UTEX Petition at 2.

¹¹ See Public Utility Commission of Texas’ Response to Petition of UTEX Communications Corporation for Preemption Under 47 U.S.C. § 252(e), WC Docket No. 09-134, at 6 and Ex. A (filed Aug. 11, 2009) (PUCT Comments). It is noteworthy that UTEX did not submit a required list identifying the issues to be resolved until more than three years after its initial request for arbitration. See *id.* at 6. Thus, although the PUCT did not complete the arbitration within the timeframe specified in section 252, it appears UTEX acceded to the PUCT’s departure from the statutory schedule. See *id.* (explaining that UTEX subsequently filed two amended arbitration petitions).

¹² See UTEX Petition at 7.

support IP-enabled services, including VoIP.¹³

5. In April 2006, the PUCT's arbitrators entered an order dismissing the proceeding on the basis that the PUCT had previously declined to consider issues implicating VoIP because it believed that the Commission intended to address such issues.¹⁴ UTEX appealed the decision to the full PUCT, which determined that it was more appropriate to abate the proceeding rather than dismiss it pending a decision by the Commission as to the appropriate regulatory classification of VoIP services.¹⁵ UTEX then challenged the state commission's order abating the arbitration proceeding in federal district court, complaining, among other things, about the PUCT's alleged inaction in the arbitration proceeding. The federal district court dismissed the complaint due to the absence of a final determination by the PUCT concerning the interconnection agreement or an order declining jurisdiction.¹⁶ On October 8, 2009, the PUCT filed an *ex parte* notice in this proceeding stating "[i]f the FCC indicates that the PUCT need not wait for the FCC to make [nationwide determinations on the appropriate regulatory treatment of VoIP services], then the PUCT will complete the arbitration."¹⁷

6. On July 13, 2009, UTEX filed the present petition for preemption alleging that the PUCT failed to act to carry out its responsibilities under section 252 in that it refused to complete the arbitration of the pending interconnection disputes.¹⁸ All commenters but UTEX advocate denial of the UTEX Petition.¹⁹ For the reasons set forth below, we deny UTEX's petition for preemption.

¹³ See *id.*

¹⁴ See *id.* and Exs. 2, 3; PUCT Comments at 3.

¹⁵ See UTEX Petition at 7-8 and Ex. 4. "The PUCT explained that it was 'not appropriate to consider the issue of the regulatory classification of Voice Over Internet Protocol (VoIP) – a matter that the [PUCT] has deferred in Docket No. 28821, and a matter that has industry-wide implications – in the context of this arbitration.'" PUCT Comments at 3-4.

¹⁶ See *UTEX Communications Corp. v. Public Util. Comm'n of Texas*, 514 F.Supp.2d 963, 971 (W.D. Tex 2007); UTEX Petition at 8 and Ex. 7.

¹⁷ See Letter of John R. Hulme, Assistant Attorney General, on behalf of Public Utility Commission of Texas to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 09-134 (filed Oct. 8, 2009) (Oct. 8 PUCT *Ex Parte* Letter).

¹⁸ Shortly thereafter, the Commission released a Public Notice seeking comment on the preemption petition. See *Pleading Cycle Established for Comments on Petition of UTEX Communications Corporation for Preemption of the Jurisdiction of the Public Utility Commission of Texas Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 09-134, 24 FCC Rcd 9432 (2009). Comments were filed on August 11, 2009 and replies on August 18, 2009.

¹⁹ See, e.g., AT&T Texas Response to Petition of UTEX Communications Corporation for Preemption Under 47 U.S.C. § 252(e), WC Docket No. 09-134 at 2 (filed Aug. 11, 2009) (AT&T Texas Comments); Comments of the National Exchange Carrier Association, Inc., WC Docket No. 09-134 at 4-5 (filed Aug. 11, 2009) (NECA Comments); Comments of the United States Telecom Association, WC Docket No. 09-134 at 3-4 (filed Aug. 11, 2009) (USTA Comments); National Telecommunications Cooperative Association Reply Comments, WC Docket No. 09-134 at 3 (filed Aug. 18, 2009) (NTCA Reply Comments); Reply Comments of Verizon, WC Docket No. 09-134 at 1 (filed Aug. 18, 2009) (Verizon Reply Comments). Commenters observe that the regulatory issues surrounding VoIP are pending in several rulemaking proceedings and express the view that it would be inappropriate for the Commission to make a determination with significant industry-wide consequences in the context of an interconnection arbitration proceeding.

III. DISCUSSION

7. UTEX does not meet its burden of showing that the PUCT “failed to act” within the meaning of section 252(e)(5) on disputes regarding the new interconnection agreement between itself and AT&T Texas.²⁰ First, we find that the PUCT initially responded to UTEX’s request for arbitration in a timely manner by quickly initiating proceedings.²¹ Within a month of UTEX filing its arbitration request, the PUCT issued an order establishing a prehearing conference.²² In its comments here, moreover, the PUCT represented that, despite the current abatement of its proceeding, it “is attempting to carry out its responsibility to arbitrate a new UTEX interconnection agreement, and UTEX has not been deprived of a forum for its arbitration request.”²³ We agree. AT&T Texas and UTEX agreed that the nine-month statutory deadline by which a final interconnection agreement would be in place was to be July 1, 2005; this deadline was extended several times by the parties.²⁴ The proceeding was later abated, without a decision indicating an unwillingness by the PUCT to act.

8. Nor are we willing to preempt the PUCT’s statutorily assigned arbitration function based simply on the time that has elapsed since the PUCT abated its proceeding.²⁵ The PUCT abated the

²⁰ “The party seeking preemption must prove that the state has failed to act to carry out its responsibilities under section 252 of the Act.” 47 C.F.R. § 51.803(b). “The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame.” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*) (subsequent history omitted).

²¹ We agree that “nothing in this [petition] suggests the PUCT or its staff arbitrators were the reasons this arbitration dragged on for several years and could not be completed by the nine-month Federal Telecommunications Act deadline.” PUCT Comments at 2. The Commission must “evaluate whether a state commission has fulfilled its responsibility under section 252 based on the particulars of each case.” *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280, para. 8 (2000) (*Starpower Preemption Order*).

²² UTEX filed its petition for arbitration with the PUCT on July 31, 2002. *See* UTEX Petition at 2. “This energetic discharge of State commission responsibility is standard PUCT practice; the PUCT has routinely arbitrated and approved ICAs under the 1996 Act, and has routinely resolved post-ICA disputes under the 1996 Act as well.” AT&T Texas Comments at 3-4.

²³ PUCT Comments at 1. The Commission has granted preemption when state commissions explicitly refuse to act. The PUCT, unlike the state commissions in those cases, has not explicitly refused to act in the UTEX-AT&T Texas ICA arbitration. *Cf. Starpower Preemption Order*, 15 FCC Rcd 11280, para. 7 (granting preemption because the Virginia Commission failed to act when it “explicitly declined to take any action with respect to Starpower’s petitions.”); *Petition of Northland Networks, Ltd. For Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended*, WC Docket No. 03-242, Memorandum Opinion and Order, 19 FCC Rcd 2396, 2400, para. 9 (WCB 2004) (“As in *Starpower*, the state commission in this case has expressly declined to interpret or enforce the terms of the identical interconnection agreements at issue.”).

²⁴ *See* PUCT Comments at 6 and Ex. A.

²⁵ UTEX argues that “[b]y stating that the proceeding is ‘abated,’ and failing to take up the issue for over three years, the [PUCT] has effectively refused to arbitrate the issue.” UTEX Petition at 8.

proceeding on June 7, 2006, stating it was “not appropriate to consider the issue of the regulatory classification of Voice over Internet Protocol — a matter that has industry-wide implications — in the context of this arbitration.”²⁶ UTEX responded by challenging the PUCT’s decision in federal district court.²⁷ Only after that challenge was dismissed on March 18, 2009, did UTEX file its petition for preemption.²⁸ Thus, although, as we discuss below, the PUCT could have relied on existing law to reach a decision rather than abating the arbitration, we nevertheless find that, in large part, the time lapsed since the initiation of that abatement is properly attributable to the litigation, rather than a failure of the PUCT to act.

9. Under the facts before the Commission, the PUCT did act to complete its duties in a timely manner, but believed that it was unable to make a final determination with regard to UTEX’s arbitration request solely because the Commission has not resolved the regulatory classification of VoIP traffic, and the associated intercarrier compensation obligations. Importantly, the PUCT actively conducted the arbitration proceeding, and did so in a timely manner, until UTEX asserted that all of the terms of the new interconnection agreement involve VoIP.²⁹ The PUCT perceived the absence of Commission resolution of these regulatory questions as an obstacle to its conclusion of the arbitration proceeding. It is clear from the record that the PUCT stands ready to resolve this arbitration, however.³⁰ Indeed, the PUCT recently affirmed its willingness to complete the arbitration should we deny the preemption petition and make clear (as we do below) that the lack of regulatory direction from the Commission regarding these issues does not, in fact, stand as a legal obstacle to the PUCT’s resolution of the arbitration.³¹ In light of the important role for the states established under section 252, the Commission has explained that it “will not take an expansive view of what constitutes a state’s ‘failure to act.’”³² Consequently, we find it most consistent with section 252 of the Act to allow the PUCT to fulfill its responsibilities under the Act.

10. Notwithstanding our decision not to preempt, we make clear that the Act requires timely arbitration, even where there is uncertainty in the law because the Commission has not addressed a particular question.³³ The PUCT has affirmatively indicated its desire to retain jurisdiction over the

²⁶ *Id.* at Ex. 4.

²⁷ *See id.*

²⁸ *See id.* at 8.

²⁹ *See* PUCT Comments at 6.

³⁰ *See, e.g.,* PUCT Comments at 1.

³¹ *See* Oct. 8 PUCT *Ex Parte* Letter.

³² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 96-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*).

³³ *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3844, para. 326 (1999) (noting the fact that some state commissions had required unbundling of dark fiber in the absence of the Commission having addressed that issue, and that those decisions had been upheld in federal court); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3704-05, para. 25 (1999) (finding that, under the requirements of section 251 and 252 of the Act, state commission could arbitrate reciprocal compensation

(continued ...)

arbitration,³⁴ and we believe that it is best-suited to resolve such matters.³⁵ We emphasize that the PUCT should not wait for Commission action to move forward. Rather, the PUCT must proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law. Should the PUCT fail to resolve this arbitration within nine months of the date of release of this order, we invite the parties to re-file a request for preemption at that time, based on those new facts.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), and pursuant to the authority delegated in sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, the petition filed by UTEX COMMUNICATIONS CORPORATION on July 13, 2009 for the preemption of the Public Utilities Commission of Texas IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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obligations for ISP-bound traffic, even in the absence of Commission guidance), *rev'd on other grounds*, *Bell Atlantic v. FCC*, 206 F.3d 1 (D.C.Cir. 2000).

³⁴ “Contrary to UTEX’s allegations, the PUCT is attempting to carry out its responsibility to arbitrate a new UTEX interconnection agreement, and UTEX has not been deprived of a forum for its arbitration request.” PUCT Comments at 1.

³⁵ We believe the fact-specific nature of this proceeding lends itself to the state commission’s consideration. *See Starpower Preemption Order*, 15 FCC Rcd at 11279-80, para. 6 (“due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements”); *see also* NECA Comments at 4 (“NECA agrees, therefore, that the Commission needs to address issues relating to application of access charges and other forms of intercarrier compensation to IP-enabled traffic. But it is by no means clear [that] preempting the [PUCT’s] jurisdiction and attempting to arbitrate a specific interconnection dispute between UTEX and AT&T would be the best way to accomplish this goal.”); NTCA Reply Comments at 5 (“NTCA [National Telecommunications Cooperative Association] and commenters urge the Commission to focus on the large issues, rather than engage in piecemeal regulation.”).